

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other	)	
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television	)	
Fixed Service Amendment of Parts 21 and 74 to Engage	)	
in Fixed Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service	)	
for the Gulf of Mexico	)	
	)	

**REPLY COMMENTS OF**  
**HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

Hispanic Information and Telecommunications Network, Inc. ("HITN"), by its attorneys, hereby submits its reply to comments filed in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") in the above captioned matter.<sup>1</sup>

HITN is a non-profit private foundation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications

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<sup>1</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands,

services. HITN is one of the largest license holders of Instructional Television Fixed Service (“ITFS”) spectrum and holds licenses in more than forty markets throughout the United States that are used to provide educational programming and advanced broadband wireless services.<sup>2</sup> HITN purchases channel capacity from EchoStar to broadcast its 24-hour public interest Spanish language channel, HITN-TV, over the Dish Network, and its programming is carried on the Time Warner Cable Network. HITN also provides satellite based broadband Internet access to some of the poorest schools and libraries throughout the most remote regions of Puerto Rico.

In response to the NPRM, overwhelming supporting comments were filed by a major cross-section of parties in favor of the adoption of new rules for the ITFS/MDS band based largely on the white paper proposal submitted on October 7, 2002, by the Wireless Communications Association International, Inc. (“WCA”), Catholic Television Network (“CTN”), and the National ITFS Association (“NIA”)<sup>3</sup> (“Coalition Proposal”), as well as their Joint Comments filed in this proceeding.<sup>4</sup> It is HITN’s belief therefore that the Commission should carefully consider the substantial adoption of the proposals made in the Coalition Proposal.

Since the broad-based support for the Coalition Proposal speaks for itself, HITN will not address any of those supporting commenters in this proceeding. These reply comments will

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Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003) 18 FCC Rcd 6722 (2003).

<sup>2</sup> Through a partnership with Clearwire Holdings, Inc., which is leasing the excess capacity of our ITFS channels in Jacksonville, Florida and several other markets, HITN and Clearwire launched next generation broadband wireless service in Jacksonville in January 2003. For more information see: <http://www.clearwire.com/default.asp?IsDev=False&NodeId=686>

<sup>3</sup> NIA is a non-profit organization composed of educational and non-profit ITFS licensees, permittees and applicants. NIA acts as an industry association gathering and disseminating information on issues related to ITFS, and represents the interests of its members.

<sup>4</sup> Comments of WCA, NIA and CTN, MB Docket No. 03-66, filed September 8, 2003.

focus on comments on several other issues we believe should be evaluated more carefully by the Commission in this proceeding – some that we support and others that we oppose.

## **I. STATION BUILD-OUT REQUIREMENTS**

In its comments, HITN requested the Commission provide a blanket grant to any affected ITFS license holder that had a valid and timely filed request for extension of construction permit filed with the Commission since the release of the Commission's Notice of Proposed Rulemaking in the Matter of Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 12 FCC Rcd 22174 (1997), released October 10, 1997.<sup>5</sup> In its comments, Wavetel, LLC ("Wavetel"), citing many of the same concerns and reasons for construction issues/problems as HITN, made a similar request to the Commission.<sup>6</sup> The uncertainty in the economy and the ITFS rules over the past several years has had a significant impact on the ability of many educators to construct their ITFS stations. HITN strongly supports and requests the Commission take immediate action to grant relief to licensees affected by this uncertainty as described and requested in the HITN and Wavetel Comments.<sup>7</sup> The public interest requires nothing less.

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<sup>5</sup> Comments of Hispanic Information and Telecommunications Network, MB Docket No. 03-66, filed September 8, 2003, at pp. 3-4 ("HITN Comments").

<sup>6</sup> See Comments of Wavetel, L.L.C., et. al., MB Docket No. 03-66, filed September 8, 2003, at pp. 2-6 ("Comments of Wavetel").

<sup>7</sup> BellSouth Corporation also requests the Commission extend build-out requirements for MMDS BTA authorizations to the end of the ten year term for those authorizations, citing that licensees have delayed plans to construct stations due to the business downturn and need for new rules. See Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., MB Docket No. 03-66, filed September 8, 2003, at page 29-30. The construction problem not only is affecting ITFS license holders that have historically relied on commercial lessees of their spectrum to construct their stations, but commercial operators as well.

## **II. TWO-SIDED AUCTIONS**

In the NPRM, the Commission seeks comments regarding whether a two-sided auction should be implemented to “restructure” the ITFS and MDS spectrum.<sup>8</sup> HITN strongly opposes any comments supporting this proposition.<sup>9</sup> The Commission has never conducted such an auction, may not have jurisdiction to do so under Section 309(j) of the Communications Act,<sup>10</sup> and there is no need for such an auction. The Commission created a secondary market policy for ITFS spectrum in 1983, when it initially determined to permit ITFS license holders to lease the excess capacity of their spectrum to commercial interests.<sup>11</sup> These leasing relationships and practices that the Commission created, endorsed and today condones, have led to a very robust market for the development of this spectrum – which will be especially true under the right set of technical rules that this proceeding aims to create. A two-sided auction only promises to create further delay and uncertainty with respect to when and how the ITFS/MDS spectrum will be put to its best and highest use.

## **III. ITFS LICENSE HOLDER ELIGIBILITY**

Several commenters have suggested that eligibility to hold an ITFS license should be opened up to commercial entities and that ITFS license holders should be permitted to sell their

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<sup>8</sup> See NPRM at §§241-246.

<sup>9</sup> See Comments of Spectrum Market, LLC, MB Docket No. 03-66, filed September 8, 2003, at page 18 (“SM Comments”), Comments of the Information Technology Industry Council, MB Docket No. 03-66, filed September 8, 2003, at page 7, Comments of Atlanta Interfaith Broadcasters, Inc., MB Docket No. 03-66, filed September 8, 2003, at page 18 (“Comments of AIB”), Comments of Ad Hoc MMDS Licensee Consortium, MB Docket No. 03-66, filed September 8, 2003, at page 9 (“Comments of AHMLC”), Comments of Independent MMDS Licensee Coalition, MB Docket No. 03-66, filed September 8, 2003, at page 19 (“Comments of IMLC”).

<sup>10</sup> See Comments of Comments of the New America Foundation, et. al., MB Docket No. 03-66, filed September 8, 2003, at 27 (“Comments of NAF”)

<sup>11</sup> See HITN Comments at pp. 3-4.

ITFS authorizations to such parties.<sup>12</sup> As HITN suggested in its comments, permitting commercial entities to acquire ITFS licenses or permitting the sale of ITFS spectrum will forever alter the purpose of this spectrum allocation – to support educational initiatives.<sup>13</sup> The principal parties supporting the ability of ITFS license holders to sell their spectrum to commercial entities are commercial parties themselves motivated by purely economic interests. Any ITFS license holder(s) that supports the sale of this valuable national educational resource is clearly not a true educator whose mission is to utilize this spectrum for the purposes it was allocated. In this respect, HITN strongly opposes the comments of Network for Instructional Television, Inc. (“NITV”) filed in this proceeding, which support the proposition that ITFS entities should be permitted to sell their licenses.<sup>14</sup> The Commission should not be distracted from the reasons this spectrum was originally (and is presently) allocated and its importance to national education by the comments of a few economically motivated commercial interests.<sup>15</sup>

#### **IV. REALLOCATION OF ITFS**

Several parties have filed comments suggesting that the Commission take away the ITFS spectrum and reallocate it for unlicensed use or for auction to commercial interests.<sup>16</sup> The

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<sup>12</sup> See Comments of Sprint Corporation, MB Docket No. 03-66, filed September 8, 2003, at page 23, Comments of EarthLink, Inc., MB Docket No. 03-66, filed September 8, 2003, at page 10, Comments of the National Telecommunications Cooperative Association, MB Docket No. 03-66, filed September 8, 2003, at page 4.

<sup>13</sup> HITN Comments at page 10.

<sup>14</sup> Comments of NITV at page 3. It should be noted that the primary lessee of NITV’s ITFS excess capacity is Sprint, one of the only parties to also file comments in this proceeding requesting the Commission permit ITFS entities to sell their spectrum licenses.

<sup>15</sup> As a corollary to this, Intel proposes the Commission auction ITFS white space to commercial entities on an overlay basis. See Comments of Intel, MB Docket No. 03-66, filed September 8, 2003, at pp. 7-8. As HITN suggested in its comments, all ITFS white space should be auctioned only to ITFS eligible parties, and those parties with mutually exclusive applications for such space should be the only parties eligible to participate auctions for white space in those respective markets. See Comments HITN at page 10.

<sup>16</sup> See Comments of NAF at pp. 6-7, Comments of AHMLC at pp. 9-10.

Commission has already extensively examined whether any ITFS spectrum should be reallocated as these commenters suggest and has determined that reallocating incumbents on this spectrum in favor of “new service providers would be detrimental to the public interest.”<sup>17</sup> None of the commenters now requesting the Commission reallocate ITFS spectrum participated in the Mobility Rulemaking, where they would have had their chance to make their case for reallocation. In this proceeding, the Commission is not seeking comment on this issue again and should therefore reject any proposals to introduce closed issues into this proceeding.

## **V. LEASE ISSUES**

The Comments of IMLC request the Commission require that all parties to MDS/ITFS leases “must enter into good faith negotiations to conform their agreements to the framework of the new rules while maintaining as closely as possible the business relationship created by the existing leases.”<sup>18</sup> As justification for its proposal, IMLC cites the Commission’s decision in re Amendment of Parts, 1, 21, and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd. 19112 (1998), modified 14 FCC Rcd 12764 (1999) (“Two-Way Order”). However, contrary to what IMLC suggests, in the Two-Way Order, the Commission did the exact opposite and determined that it would not require any parties to conform leases to the new rules being adopted in that proceeding.<sup>19</sup> Citing HITN’s comments in that proceeding, the Commission specifically declared that the “construction of existing

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<sup>17</sup> See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, First Report and Order and Memorandum Opinion and Order, ET Docket No. 00-258, released September 24, 2001, at §§28-29 (“Mobility Rulemaking”).

<sup>18</sup> See Comments of IMLC at page 23.

<sup>19</sup> See Two-Way Order at §132.

agreements is a matter of contract law.”<sup>20</sup> Therefore, Commission precedent amply establishes that the Commission will not interfere with existing contracts to force parties to modify contracts to conform to new rules.<sup>21</sup>

As a corollary, however, HITN proffers that the Commission does have the jurisdiction and authority to void any term(s) that are found to be unlawful or contrary to Commission rules or policy in ITFS lease agreements, over which the Commission initially took jurisdiction in 1983.<sup>22</sup> In this respect, HITN believes the Commission should not permit a commercial lessee of ITFS spectrum to, for example, extend a 10 year analog video programming based excess capacity lease entered into under the former rules that limited lease terms to a maximum 10 years, for an additional 5 year term, pursuant to a claim the Commission authorized 15 year leases in the Two-Way Order, notwithstanding that the lessee has never fulfilled the terms of the agreement to construct an analog wireless cable system. This type of activity by an ITFS lessee typically serves only to hold the ITFS licensee’s channels hostage under an outdated video-only lease until the ITFS licensee enters into a new two-way data lease with the commercial lessee on its terms, preventing the ITFS licensee from entering into a new two-way data lease with a third party. The Commission can and should declare that this practice is unlawful and not permissible under its rules. The public interest requires in this instance that the Commission confirm that commercial lessees of ITFS spectrum capacity may not prevent an ITFS license holder from developing its spectrum under the current rules by a threat of enforcement of tenuous lease provisions granting an additional 5 year period to hold the spectrum hostage.

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<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> See In re Amendment of Parts 2, 24, 74 & 94 of the Commission’s Rules Regarding Frequency Allocation to ITFS and MDS, 94 FCC2d 1203, FCC 83-243, released July 15, 1983.

In its comments, Spectrum Market, LLC (“SM”) proposes that the Commission either terminate all leases in existence at the time the new rules in this proceeding are adopted,<sup>23</sup> or declare that such leases may not be extended beyond 15 years.<sup>24</sup> While HITN disagrees that the Commission should terminate all leases entered into under the current rules and further disagrees that the Commission has the jurisdiction to do so, we believe SM’s proposal regarding limiting lease extensions well founded but misses the mark. The lease gamesmanship being played by commercial ITFS lessees is not with respect to attempting to extend analog or one-way legacy leases beyond 15 year terms as SM suggests, but rather, as proffered by HITN, to extend those leases beyond ten year terms, in violation of the rules and policies that were in effect at the time these leases were executed. Either way one looks at this issue, the end result to the educator is the same – a lessee that has no intention of ever fulfilling the terms of its original analog video-only wireless cable contract, whatever the term, is holding the ITFS spectrum hostage and continuing to deprive the public of the development of this valuable educational resource. The Commission should declare that no ITFS lessee may extend a lease entered into prior to the release of the Two-Way Order beyond its original 10 year term or for any additional term beyond 10 years (whatever provision that may be construed to permit such extension in the lease), unless that lessee intends to promptly fulfill all of its obligations under the lease as to construction and operation of the analog video wireless cable facility contemplated thereby. Any lessee that cannot make these affirmative representations should have no right to extend such a lease under any circumstances.

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<sup>23</sup> See Comments of SM at pp. 13-16.

## **VI. CONVERSION TO LOW POWER**

In its comments, SM also suggests the Commission require that all MDS/ITFS spectrum be reassigned for low power operations only.<sup>25</sup> This proposal is based on the assertion that permitting only low power uses on the spectrum will command higher spectrum values.<sup>26</sup> While SM may be interested in MDS/ITFS spectrum transactions yielding the high valuations as cited in its comments and in the BIA Financial Network report attached thereto in order to drive SM's prospective speculator business as the "E-Bay of MDS/ITFS", it is HITN's position that the potential valuation of educational spectrum (or MDS) should have nothing to do with any of the Commission's decisions in this proceeding – and especially with respect to the services that may be provided on the spectrum. As the numerous supporting commenters in this proceeding have agreed, the Coalition Proposal to accommodate a plethora of new low power services, along with preserving valuable educational and commercial high power services in the band, is the correct approach for this band and should be adopted.

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<sup>24</sup> Id. At page 17.

<sup>25</sup> Id. at 11-12.

<sup>26</sup> See Comments of SM at 12 (citing to an attached valuation study prepared by BIA Financial Network).

## **VII. CONCLUSION**

For the forgoing reasons, the Commission should adopt the Coalition Proposal and the proposals made by HITN in these reply comments, and reject those alternative proposals made by other parties in this proceeding consistent with these reply comments.

HISPANIC INFORMATION AND  
TELECOMMUNICATIONS NETWORK, INC.

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October 23, 2003

## CERTIFICATE OF SERVICE

I, Rudolph J. Geist, hereby certify that copies of the foregoing Reply Comments of Hispanic Information and Telecommunications Network, Inc. were served this 23rd day of October, 2003 on the following parties via first class mail of the United States Postal Service, postage prepaid, to the following addresses:

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